STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2014
v	No. 307325 Leelanau Circuit Court
DAVID CHARLES BOUWMAN, Defendant-Appellant.	LC No. 2011-001719-FH

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of criminal sexual conduct in the third degree, MCL 750.520(d)(1)(c) (the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless). The trial court sentenced defendant to 20 to 180 months' imprisonment. We affirm.

First, defendant argues that he was denied the effective assistance of counsel. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's findings of fact for clear error and the constitutional question de novo. *Id.* Because no *Ginther*[1] hearing was held, our review is limited to the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To establish his claim of ineffective assistance of counsel, defendant "must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Under this test, defendant must overcome the strong presumption that, under the circumstances, the challenged action of counsel might be considered sound trial

[1] See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

strategy. *LeBlanc*, 465 Mich 578. "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In closing, the prosecution argued as follows:

> The testimony of the defendant, you might say, well, you know, we can't just assume he was lying; well, you can't make that assumption, you have to use your common sense, you have to use your everyday experience as jurors. You have to take a look at the facts and see how they aline with what your instincts and what your minds tell you. But, if someone is going to engage in the activity with a straight man that Mr. Bouwman engaged in, or is alleged to have engaged in, with [the victim] to take the next step, that they would be willing to tell whatever story suits their purpose when standing or sitting before you isn't a very large leap at all. As a matter of fact, it makes perfect sense that if that happened, if you would live the lie of the deception and the abuse of another human being like this, they aren't going to be coming in here telling the truth about it.

Defendant argues that counsel was ineffective for failing to object to these comments because the prosecution was attacking his credibility based solely on his sexual orientation. But the prosecution did not attack defendant's credibility based on his sexual orientation. Rather, it properly argued that defendant had a motive for lying in court. It is reasonable to infer that defendant, a successful business man with a family, would not want anyone to know that he sexually assaulted another man and would therefore invent a story about the incident. Prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Because the prosecution's argument was proper, defense counsel was not ineffective for failing to object. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Counsel was also not ineffective for failing to object to testimony regarding the results of Vertical and Horizontal Gaze Nystagmus Tests (commonly abbreviated VGN and HGN, respectively) or the possibility that the victim had ingested a controlled substance. At trial, several witnesses testified that they believed the victim was under the influence of both a controlled substance and alcohol. First, a nurse at the hospital, Amedee Mortenson, testified that she believed the victim was drugged because his demeanor was inconsistent with alcohol intoxication and said she was surprised to see his drug screen come back negative. Next, police officer Roger Collins testified that he visited the victim in the emergency room and administered the VGN and HGN tests, concluding that the victim was under the influence of drugs or alcohol. Defendant argues that counsel was ineffective for failing to object to Collins's testimony regarding VGN and HGN and for failing to investigate or rebut the evidence with an expert witness. Similarly, defendant argues that counsel was ineffective for failing to object to Mortenson's and the prosecution's speculation that the victim was drugged, despite his negative drug screens. Neither argument has merit.

First, Collins clearly qualified his testimony by noting that the VGN and HGN test results indicate either drug or alcohol consumption. Also, Mortenson testified that the victim was intoxicated by alcohol, with a blood alcohol level of .121. As for Mortenson's speculation about drug intoxication, we conclude that defense counsel could have reasonably decided that there was no further need to draw attention to Mortenson's suspicions given the clear testimony that the drug screen was negative. Similarly, counsel could have concluded the best strategy was not to question the prosecutor's argument in front of the jury. Counsel could have concluded that the jury might question the prosecutor's assertions in light of the testimony and thus possibly question the credibility of the prosecution's case in general.

Counsel was also not ineffective for failing to request an instruction on the defense of consent or for failing to object to an instruction on defendant's statements as evidence against him. A consent defense is not generally available in a criminal sexual conduct prosecution under MCL 750(d)(1)(c), as consent requires "a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age who are neither 'mentally defective,' 'mentally incapacitated,' nor 'physically helpless[.]'" *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978) (citations omitted). Second, defendant's theory of the case throughout trial was that the victim extorted him with false accusations of criminal sexual conduct. Although inconsistent defenses are permitted, counsel might have concluded as a matter of strategy to pursue the one defense believed strongest and not risk weakening it with an inconsistent one. This Court will not now question counsel's strategy with the benefit of hindsight. *Matuszak*, 263 Mich App at 58.

As for counsel's failure to object to the court's jury instruction predicated on CJ12d 4.1, at the hearing on defendant's motion for a new trial, we note that the lower court found that it gave this instruction erroneously, as it should have been limited to defendant's statements made to law enforcement. Nonetheless, the lower court found the error harmless. We agree. In a recorded telephone conversation between defendant and the victim, defendant consistently denies perpetrating the sexual assault, which is consistent with his testimony at trial. As a result, this likely bolstered defendant's credibility. In any event, the lower court specifically instructed the jury how to properly weigh the witness's conflicting testimony, stating, "You do not have to accept or reject everything a witness said. You are free to believe, all, none, or part of any person's testimony. In deciding which testimony you believe, you should rely on your own common sense and everyday experience." We presume that the jury followed the lower court's instructions. *Unger*, 278 Mich App at 237.

Further, counsel was not ineffective for failing to object to the prosecution's comments regarding defendant's presence at trial. On cross-examination, the prosecution questioned defendant about the fact that his having heard other witnesses testify could allow him to tailor his own testimony accordingly. Then, in his closing, the prosecution made the following argument:

> But, until everyone else had had their opportunity to speak and after Mr. Bouwman had an opportunity to listen carefully to all of that testimony he gave his story of what occurred that evening. I think it's interesting to note that his story, in terms of its divergents [sic] with [the victim's] testimony began when

> [the victim's] memory lapsed. In other words, where are the big differences in that testimony. The big differences are where [the victim] says, I don't remember anything after that and that's where all of the damning facts, all of the facts that would tend to make [the victim] the evil transgressor in this instance come out; pretty convenient because there is no way you can argue against facts when your testimony sworn to under oath is I don't remember anything after that.

Defendant argues that this line of questioning and argument violated his constitutional right to be present at trial, and counsel was therefore ineffective for failing to object. This argument is meritless. The Michigan Supreme Court addressed and rejected this argument in *People v Buckey*, 424 Mich 1, 13-16; 378 NW2d 432 (1985) (holding where supported by evidence such an argument is "is perfectly proper comment on credibility").

Counsel was also not ineffective for failing to convince the lower court to admit irrelevant other acts evidence tangentially related to the victim's sexual orientation. See MRE 402. Nor did counsel improperly dilute the presumption of innocence or the prosecution's burden of proof. Defendant claims that during jury voir dire, counsel asked a potential juror what the juror's verdict would be if the juror had to decide the case immediately. The juror responded, "I couldn't do it." When asked why, the juror stated, "I didn't hear any evidence." Defendant asserts that counsel should have instructed the juror that with no evidence presented, the verdict should be not guilty. Second, during preliminary instructions, the lower court instructed the jury as to the burden of proof, stating, "That is the essence of the charge, and those are the three elements that the prosecutor must prove beyond a reasonable doubt for you to find the defendant guilty." Defendant argues that this was error because the lower court did not instruct further on the specifics of the presumption of innocence. Third, also during preliminary instructions, the lower court advised the jury that both attorneys would start by making opening statements. Defendant faults his counsel for failing to insist that the lower court inform the jury that defendant is not required to make an opening statement because of the presumption of innocence. Fourth, defendant argues counsel diluted the presumption of innocence by presenting evidence that no video footage showed the victim stopped at a gas station after the incident. Finally, defendant argues that counsel failed to object to the prosecutor's closing argument that a trial "is a truth seeking process [where] . . . you hear from both sides and each side has an opportunity to try and poke away at the other side's case [and] the truth emerges from that."

Contrary to defendant's claim, none of these incidents demonstrates that counsel was ineffective. First, the juror voir dire does not demonstrate that defense counsel diluted the presumption of innocence. If anything, the juror's response indicates that the juror would hear evidence at trial with an open mind. Second, counsel was not ineffective for presenting evidence, for failing to constantly request a presumption of innocence instruction at trial, or for failing to object to the prosecution's closing argument. Certainly, counsel was not required to produce evidence challenging the victim's credibility. But having done so, it simply does not follow that challenging the evidence presented by the prosecution, including the credibility of the complainant, somehow undercuts the state's burden of proof. In any event, the lower court properly instructed the jury at the close of proofs on the presumption of innocence. Again, jurors

are presumed to follow the lower court's instructions. *Unger*, 278 Mich App at 237.

Finally, counsel was not ineffective for failing to object to the prosecution's proper comments. *Ericksen*, 288 Mich App at 201.

Defendant also argues that counsel was ineffective for failing to object to (1) the prosecution's comment that it is possible the victim was drugged notwithstanding his negative drug screens, (2) the prosecution's comment that the jury was anticipating defendant's side of the story, and (3) the prosecution's comment that the victim was ashamed and embarrassed about what happened. First, defendant's challenge to the prosecution's comments regarding the victim's consumption of a controlled substance has been discussed and dismissed above. Second, the prosecution did not improperly burden defendant's right to testify at trial or to remain silent by commenting in his closing argument that "there was a fair amount of suspense" since opening statements "created by not knowing what [defendant] was going to say." The prosecutor was not commenting on defendant's right to testify or remain silent. Rather, he was simply commenting, in a somewhat colorful manner, that there had been some uncertainty about what defendant's testimony about the events of that night would be. Third, the prosecution's comment that the victim was ashamed and embarrassed about the incident does not amount to an appeal for a civic duty verdict. This case essentially boiled down to a credibility contest between the victim and defendant. As such, it was reasonable for the prosecutor to argue that the victim would not subject himself to the shame and embarrassment of testifying at trial unless he was telling the truth. And because the prosecution's comments were not improper, counsel was not ineffective for failing to object. *Ericksen*, 288 Mich App at 210.[2]

Finally, defendant argues that the lower court improperly scored 15 points under offense variable (OV) 10. The lower court's sentencing decisions must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Although the trial court's findings of fact are reviewed for clear error, the interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *Id.*

OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40(1). Under the statute, a trial court must score 15 points if defendant engaged in "predatory conduct." MCL 777.40(1)(a). The statute defines "predatory conduct" as "preoffense conducted directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). "Predatory conduct" is more than opportunistic criminal conduct or run-of-the-mill planning of a crime. *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011). It contemplates preoffense conduct that is commonly understood as being "predatory" in nature, such as lying in wait or stalking. *Id.*

Here, the lower court did not err in finding that defendant engaged in predatory conduct. Contrary to defendant's position, his actions amount to more than the simple targeting of an intoxicated victim. The evidence demonstrates that defendant invited the victim to travel to his

[2] Defendant raises these challenges under a claim of lower court error and prosecutorial misconduct. Because we have found all of defendant's arguments meritless, we decline to address the issues further.

cabin on Lake Leelanau. Thereafter, defendant initiated a night of heavy and prolonged drinking. Then, when the victim was too intoxicated to resist, defendant perpetrated the sexual assault. These facts establish by a preponderance of the evidence that defendant specifically targeted the victim for the primary purpose of victimization.

We affirm.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens